

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION**

BMG RIGHTS MANAGEMENT (US) LLC, and )  
ROUND HILL MUSIC LP, )

Plaintiff,

Case No. 1:14-cv-1611 (LOG/JFA)

V.

COX ENTERPRISES, INC., COX  
COMMUNICATIONS, INC., and  
COXCOM, LLC,

Defendants.

**COX'S SUPPLEMENTAL BRIEFING REGARDING  
EVIDENTIARY OBJECTIONS TO RIGHTSCORP NOTICES**

As the Court requested during proceedings on December 2, 2015, Cox respectfully submits further briefing on the issue of its evidentiary objections to Rightscorp's notices.

As the Court correctly observed, Rightscorp’s notices to Cox on behalf of BMG are not evidence of “infringement”; they are accusations. But as BMG’s opening statement and the start of Ms. Frederiksen-Cross’s examination made clear, BMG now hopes to rely on Rightscorp notices to prove the truth of those mere accusations: that the accusations in the notices were true, and that there was “infringement.” The notices are not competent evidence of that ultimate legal conclusion, and introducing them for that purpose violates the hearsay rule. Fed. R. Evid. 801(c) (hearsay is an out-of-court statement offered for the truth of the matter asserted).

BMG cannot overcome this objection with the business records exception under Rule 803(6). That Rightscorp chose to use computers to generate millions of emails with infringement accusations does not make those accusations reliable, nor does it make them a

record of “regularly conducted activity.” Indeed, because Rightscorp sent these notices to demand settlement payments (and while planning to use them in this litigation) they lack the reliability that might otherwise accompany actual business records. *See Certain Underwriters at Lloyd's, London v. Sinkovich*, 232 F.3d 200, 205 (4th Cir. 2000) (noting that reports do not fall within the business records exception when prepared with knowledge that an incident could result in litigation).

Nor is it an excuse that some Rightscorp notices will likely be introduced for other purposes, such as showing that Rightscorp sent notices to Cox and that they included settlement demands. That the notices are admissible for *other* purposes does not solve the hearsay problem, because evidence can be hearsay when introduced for some purposes and non-hearsay for others. Fed. R. Evid. 801. The notices are not admissible to prove the proof of the statements they contain. Fed. R. Evid. 802.

A simple limiting instruction under Rule 105 can address this issue. Fed. R. Evid. 105 (the court, on timely request, must restrict evidence to its proper scope and instruct the jury accordingly.) Cox proposes the following limiting instruction:

*During this case you will see documents and hear testimony about Rightscorp notices that make statements about “infringement.” However, those notices are not evidence of infringement. Before you deliberate, I will instruct you on the legal elements you should consider in determining whether or not infringement occurred.*

Dated: December 3, 2015

Respectfully submitted,

/s/ Craig C. Reilly

Craig C. Reilly VSB # 20942

111 Oronoco Street

Alexandria, Virginia 22314

TEL: (703) 549-5354

FAX: (703) 549-5355

E-MAIL: craig.reilly@ccreillylaw.com

*Counsel for Defendants*

*Of Counsel for Defendants*

Andrew P. Bridges (*pro hac vice*)  
David L. Hayes (*pro hac vice*)  
Jedediah Wakefield (*pro hac vice*)  
Guinevere L. Jobson (*pro hac vice*)  
Fenwick & West LLP  
555 California Street, 12th Floor  
San Francisco, CA 94104  
Tel: (415) 875-2300  
Fax: (415) 281-1350  
Email: abridges@fenwick.com  
gjobson@fenwick.com

Brian D. Buckley (*pro hac vice*)  
Fenwick & West LLP  
1191 2nd Avenue, 10th Floor  
Seattle, WA 98101  
Tel: (206) 389-4510  
Fax: (206) 389-4511  
Email: bbuckley@fenwick.com

Armen N. Nercessian (*pro hac vice*)  
Ronnie Solomon (*pro hac vice*)  
Ciara Mittan (*pro hac vice*)  
Nicholas A. Plassaras (*pro hac vice*)  
Fenwick & West LLP  
801 California Street  
Mountain View, CA 94041  
Tel: (650) 988-8500  
Fax: (650) 938-5200  
Email: anercessian@fenwick.com  
rsolomon@fenwick.com  
cmittan@fenwick.com  
nplassaras@fenwick.com

**CERTIFICATE OF SERVICE**

I hereby certify that on December 3, 2015, the foregoing document was filed and served electronically by the Court's CM/ECF system upon all registered users:

/s/ Craig C. Reilly  
Craig C. Reilly, Esq. (VSB # 20942)  
111 Oronoco Street  
Alexandria, Virginia 22314  
TEL: (703) 549-5354  
FAX: (703) 549-5355  
E-MAIL: craig.reilly@ccreillylaw.com

*Counsel for Defendants*